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| Jurisdiction | Germany |
| Tribunal | Landgericht Berlin (District Court Berlin) |
| Date of the decision | 15 September 1994 |
| Case no./docket no. | 52 S 247/94 |
| Case name | <i>Italian shoes case XV</i> |

Translation by Jan Henning Berg ***

*Translation edited by Ruth M. Janal****

District Court of Berlin (*Landgericht*)

15 September 1994 [52 S 247/94]

[Subsequently, the seller appealed against the decision of the *Amtsgericht* [Lower Court], but the appeal was rejected by the *Landgericht* Berlin:] 1

Reasoning

The appeal has been brought in the right form and within the prescribed time limit but fails on the substance. 2

The *Amtsgericht* outlined correctly that the seller does not have a right to payment of the claimed additional part of the purchase price. The Court adopts the sound elaboration of the *Amtsgericht* (in analogy to § 543 ZPO [Civil Procedure Code]). 3

The Court makes the following supplementary comments:

The buyer had the right to avoid the contract in accordance with Arts. 51 and 49(1)(a) CISG as regards both the shoes under item no. (...) as well as those under item nos. (...). Those goods did not conform with the contract in the sense of Art. 35 CISG. To fulfil the requirement of this Article, the goods must be fit for the purposes for which goods of the same description would ordinarily be used or for any particular purpose made known to the seller. The goods must be 4

* All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff of France is referred to as [Seller] and Defendant of Germany is referred to as [Buyer]. Amounts in the former currency of Germany (*Deutsche Mark*) are indicated as [DM].

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of average quality, and it does not suffice that they can only just be traded. The buyer, however, outlined in detail the various defects of the shoes under the said numbering. Where the buyer provides a specific complaint about the goods, the seller principally bears the onus of presentation as regards the conformity of the goods under the contract at the time the risk passes over to the buyer. As the buyer gave notice of the lack of conformity of the goods from the very beginning, it did not accept them as performance of the seller's obligation. The seller therefore could not just limit his position to the mere denial of the lack of conformity. Insofar as the seller maintains that the delivered shoes were in accordance with the sample on the basis of which the shoes were ordered, this argument is irrelevant. A sample only has binding effect where the parties actually agreed so (Herber/Czerwenka, Commentary to the CISG, 1, edition 1991, Art. 35 No. 6). The seller never alleged such an agreement. Additionally, seller then would have had to show specifically that the sample also had the same defects as alleged by the buyer.

A right to remedy the defects or to substitute delivery does not exist. The buyer can demand avoidance of the contract as there is no right to repeated performance in case of a fundamental breach of contract. The fundamental breach of contract can – as is the case its e – also be seen in the fact that the existence of a lack of conformity is completely denied and the remedying of defects as well as substitute delivery are generally rejected.

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By its letter of 8 March 1993, the buyer also sent the necessary notice of avoidance as required under Art. 26 CISG. The letter of 26 April 1993 by which the buyer informed the seller of its intention nevertheless to attempt to sell items (...) does not affect the avoidance of the contract that had already been communicated. The intended action is rather a measure to mitigate any loss to which the buyer is obliged under Art. 77 CISG. As the items are still with the buyer, their return is also possible.

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Neither does the seller have a right to interest under Art. 78 CISG in respect of the partial payment due for the faultless goods. A seller may claim interest under Art. 78 CISG where the buyer fails to pay the price or any sum in arrears. However, here the buyer had the right to suspend the performance of the contract under Art. 71(1)(b) CISG according to which one party to the contract may suspend the performance of his obligations where, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations – this may be based on a certain conduct in the preparation of or during the performance itself. A fundamental breach of contract in the sense of Art. 25 CISG is not necessary (Herber/Czerwenka, Commentary to the CISG, Art. 71 No. 5). As the seller refused performance in respect of items (...), the buyer could conclude from this conduct that the seller was not going to perform a substantial part of his contractual obligations. The notice of suspension required under Art. 71 CISG can be seen in the buyer's letter of 8 March 1993, in which it refused acceptance of the defective items and offered their return.

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Due to the reasons outlined above, the seller does not have a right to recover any pre-trial legal expenses regarding the faultless part of the goods. In this respect the buyer also had the right to suspend its performance under Art. 71 CISG.

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